No. 86-2

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

OTIS R. BOWEN, as Secretary of Health and Human Services,
Petitioner,

vs.

DAVID DIXON, RICARDO RAMIREZ, OPHELIA CASEY, DOMINGA CARRASQUILLO, JOANNE LOCKETT, EULALIA TEREZ, CARMEN FELICIANO, and TOMASINA GONZALEZ, individually and on behalf of all others similarly situated,
Plaintiffs-Respondents,

—and—

THE STATE OF NEW YORK and CESAR PERALES, as Commissioner of the New York State Department of Social Services,
Plaintiffs-Intervenors-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

Petitioner, the Secretary of Health and Human Services, requests that his petition for writ of certiorari be held pending the Court's decision in *Bowen v. Yuckert, cert. granted*, 54 U.S.L.W. 3573 (May 20, 1986) (No. 85-1409). (Pet. at 13). This request should be denied because the issue on which the Secretary sought and obtained review in *Yuckert* has no bearing on the validity of the preliminary injunction in this case.

In *Yuckert*, the Secretary represented to this Court that there was no need for a factual record regarding the issues in that case because *Yuckert* raised solely the facial validity of the severity regulation that the Secretary describes as a *de minimis* screening device. (*Yuckert* Reply Br. at 4). Because this case challenges the Secretary's practices in implementing the severity regulation, resolution of the issue the Secretary presents in *Yuckert* will not dispose of the issues presented here. Indeed, every court of appeals that has considered the question has recognized that the legality of a severity rule that operates as more than a *de minimis* screening device is a wholly separate question from the facial validity of a *de minimis* rule permitting screening of claims without full vocational evaluations. These courts have all held that the Secretary cannot deny benefits on medical grounds alone with a rule that is not *de minimis*. In this case, the District Court made a preliminary finding that, in practice, the Secretary applies the severity regulation as more than a *de minimis* threshold, and this finding has not been challenged on appeal. Accordingly, the judgment below will stand regardless of this Court's disposition of *Yuckert*.

Furthermore, the preliminary stage of the proceedings in this case strongly counsels against reviewing or vacating the injunction issued below. At this stage, the parties have not yet completed discovery and the District Court has neither made final factual findings nor crafted the terms of a final injunction. As this case proceeds to trial on the merits, the Secretary will have ample opportunity to introduce any relevant evidence and to propose any appropriate form of injunction, should the District Court find that the Secretary's practices conflict with the Social Security Act. The Secretary has made no showing that he would be prejudiced by awaiting such resolution in the District Court. Indeed, the Secretary made no showing to the District Court that he would be harmed by issuance of the preliminary injunction, has never sought a stay of the injunction, and has never challenged the District Court's finding that the preliminary injunction is necessary to prevent irreparable harm to the plaintiff class. Accordingly, certiorari should be denied at this stage in this litigation and the preliminary injunction should not be disturbed.

COUNTERSTATEMENT OF THE CASE

In his appeal to the Second Circuit and his petition to this Court, the Secretary has not challenged the District Court's findings of fact. His statement of the case, however, ignores the District Court's central factual findings as well as the evidence before the District Court. Due to the early stage of the proceedings, the facts have not yet been fully developed. Those facts are nonetheless of central importance to the question whether this petition should be held and summarily disposed of as the Secretary suggests. Accordingly, respondents shall set forth the facts as currently reflected in the record.

1. The Social Security Act ("the Act") provides that a person is considered disabled if he is unable "to engage in any substantial, gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or...to last for a continuous period of not less than twelve months." 42 U.S.C. § 423(d)(1)(A). The Act explains that "for purposes of" applying this definition, a person "shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy...." 42 U.S.C. § 423(d)(2)(A). The Act further provides that a "physical or mental impairment" is an impairment that results from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory techniques." 42 U.S.C. § 423(d)(3). All twelve courts of appeals have interpreted the Act to provide that if a claimant demonstrates that he has a physical or mental impairment that prevents him from returning to his past work, he meets his *prima facie* burden of proving disability. *Johnson v. Heckler*, 769 F.2d 1202, 1210 (7th Cir. 1985) (citing cases), *petition for cert. filed*, 54 U.S.L.W. 3600 (March 11, 1986) (No. 85-1442).

2. In this case, plaintiffs challenge the Secretary's regulations and practices under which disability claims are denied on medical

grounds without any consideration of the claimant's ability to perform past work or other work in light of both medical and vocational factors. In support of their motion for a preliminary injunction, respondents submitted evidence to the District Court showing that the Secretary had deliberately instituted a harsher standard for denying disability claims after a review of medical factors alone while publicly proclaiming that his severity regulation was merely a *de minimis* mechanism for screening out frivolous claims.

3. From 1960 to 1978 the Secretary's regulations provided that if a claimant had a medically determinable impairment, the claim could be denied on medical grounds alone only if the impairment was a "slight neurosis, slight impairment of sight or hearing or other similar slight abnormality or combination of abnormalities." 25 Fed. Reg. 8100 (Aug. 24, 1960). Under this regulation, an impairment would not be denied as slight if it, in fact, prevented the claimant from returning to past work. (J.A. 659[1]).

4. In 1978, the Secretary altered these regulations to provide that a claim could be denied on medical grounds alone if the impairment was "not severe." In introducing this language, the Secretary announced in the Federal Register that the term "not severe" was not intended to alter the standard for denying claims on medical grounds alone. 43 Fed. Reg. 9296 (Mar. 7, 1978); 43 Fed. Reg. 58353 (Nov. 28, 1978).

5. Although the Secretary stated publicly that substitution of the term "not severe" for the term "slight" was not a change in standard, the uncontroverted evidence before the District Court shows that he secretly implemented a new harsher standard for screening out disability claims on medical grounds alone. In 1976, two years prior to issuance of the "not severe" regulation, the Secretary began returning large numbers of cases to State disability determination services, which perform initial determinations of disability. These "quality assurance" returns required denial of claims as not severe that would not have been denied on

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[1] "J.A." refers to the Joint Appendix filed in the Court of Appeals, a copy of which has been lodged with this Court.

medical grounds alone under prior standards. (Affidavit of Marvin Lachman, dated March 23, 1984, J.A. 275-319).

6. Both the New York Disability Determination Service and other state disability services protested that these returns reflected a heightened standard. In response, Robert Bynum, Associate Commissioner for the Office of Program Operations of the Social Security Administration, sent a memorandum to all regional commissioners informing them that the agency was departing from a "slightness" standard and would be adopting regulations under which a claim could be denied when an impairment was not severe. (Memorandum to All Regional Commissioners from Robert Bynum, January 14, 1977, J.A. 648-51).

7. After the Secretary issued the "not severe" regulations in 1978, he sent state adjudicators a list of impairments that must always be considered not severe. This list was included in an internal manual entitled the Program Operations Manual System ("POMS"); it was not published and was not subjected to notice and comment rule making. The list included impairments that would clearly prevent some claimants from returning to past work. For example, a colostomy was listed as a "not severe" impairment. Martha McSteen, then Regional Commissioner for the Dallas Region, relayed comments that most surgeons would not allow their patients to lift more than fifty pounds following surgery. (J.A. 700). Under the Secretary's Medical Vocational Guidelines, the Secretary has taken administrative notice that a person with such a limitation cannot perform substantial gainful activity if he has a history of more strenuous labor, and also suffers from an adverse vocational profile. *See* 20 C.F.R. Part 404, Appendix 2. Nonetheless, the manual instructions required a denial of benefits to all persons with the designated medical impairments.

8. In 1980, the severity regulation was rewritten to specify basic work activities that would have to be "significantly limited" in order to constitute a severe impairment. Commenting on these regulations at the time they were issued, the Appeals Council—the Social Security Administration's highest adjudicative body—

stated that the regulations were inconsistent with the Secretary's stated position that the 1978 regulations did not represent a changed standard. The Appeals Council noted that if an impairment significantly limited the capacity to understand simple instructions, for example, the claimant would be so seriously limited that he probably could not perform any substantial gainful activity even if there were no adverse vocational factors. (J.A. 667, 671).

9. When the 1980 regulations were published in final form, the Secretary stated in response to public comments that the 1978 introduction of the severity regulation constituted an expansion of the prior regulation permitting denial on medical grounds in cases of slight impairments. (Pet. App. 38a). The Secretary stated that he intended to study the efficiency of the new severity regulation. The Secretary did not revise the proposed regulation in response to the Appeals Council's comments.

10. Following promulgation of the 1980 revisions to the severity regulations, the Secretary issued two internal rulings designed to enforce the heightened not severe standard on administrative law judges and the Appeals Council. The first ruling, SSR 82-55, listed twenty impairments that must always be treated as not severe. The second ruling, SSR 82-56, made clear that an impairment could be treated as not severe even if it prevented the claimant from returning to his past work. Under 20 C.F.R. § 422.408, these rulings were binding on adjudicators at all levels of the administrative process.

11. To enforce these new rules, the Secretary conducted "refresher courses" for administrative law judges. These courses gave examples of claimants who should be denied as having "not severe" impairments. One example is of a woman with a tortuous aorta and documented narrowing of the two coronary arteries. She had been diagnosed as having atypical angina and hypertensive cardiovascular disease with coronary insufficiency. SSA's own consultative physician stated that she should not lift over 25 pounds. On these facts, the "refresher course" instructed that the

claim should be denied as not severe. Once again, this result squarely conflicts with the Medical Vocational Guidelines, which take administrative notice that a person with the described limitations and an adverse vocational profile cannot engage in substantial gainful activity. (J.A. 760-62).

12. The Secretary's heightened standard for denying claims on medical grounds alone resulted in a vast increase in claims denied without any consideration of whether the claimant could perform past work or any other work. Between 1975, when the Secretary last applied a "slightness" standard, and 1982, when he published his initial list of twenty "not severe" impairments, the percentage of claims denied on medical grounds alone climbed from 8 to 40 percent. (Pet. App. 37a).

13. On August 23, 1983, a Social Security Administration workgroup issued an internal report on the severity regulation. The report concluded:

> Whatever SSA's actual conception of the minimum impairment level was for policy purposes between 1975 and the present, its *application* of the concept in deciding cases suggests a change of position. Yet, at the same time, there was no corresponding change in the statute and, in fact, SSA itself stated that the regulations did not constitute a change of standard.

(J.A. 620).

PROCEEDINGS BELOW

14. On February 17, 1984, plaintiffs filed a motion for a class-wide preliminary injunction barring the Secretary from relying on the severity regulation to deny disability claims in New York State. On March 15, 1984, the State of New York and Cesar Perales, Commissioner of the New York State Department of Social Services, moved to intervene as party plaintiffs.

15. On June 22, 1984, District Judge Morris E. Lasker issued a preliminary injunction temporarily enjoining application of the

severity regulation in the State of New York and requiring the Secretary to reprocess claims that were pending as of the date the complaint was filed. Judge Lasker also granted plaintiffs' motion for class certification and the State plaintiffs' motion for intervention.

16. Judge Lasker based his preliminary injunction order on alternative grounds. First, he rejected the Secretary's argument that 42 U.S.C. § 423(d)(2)(A) sets out an independent severity requirement separate from an analysis of the person's ability to engage in substantial gainful activity in light of medical and vocational factors. Judge Lasker found that the Secretary's interpretation constituted a substantive rewriting of the statute, which on its face requires that impairments be evaluated in light of vocational characteristics. (Pet. App. 34a). Judge Lasker found unpersuasive the argument that the 1967 amendments to the Social Security Act, which introduced the term "severity," indicated any intention on the part of Congress to establish an independent severity test in which the interaction of medical and vocational factors could be ignored. Judge Lasker noted that when Congress wished to permit the denial of benefits based on a predetermined level of severity, it did so expressly, as in the case of disabled widows. The contrast between the two statutory definitions provided strong evidence that Congress intended an individualized assessment of medical and vocational factors for disabled workers. (Pet. App. 41a-42a). Furthermore, by disregarding vocational considerations altogether, the severity regulation violated longstanding case law providing that a claimant establishes a *prima facie* case of disability by demonstrating an inability to return to his former work. Judge Lasker observed that "[t]he Secretary does not argue that [Second] Circuit's precedents regarding the allocation of the burden of proof are incorrect, but neither does she suggest how they can be reconciled with the severity regulation." (Pet. App. 43a-44a).

17. Judge Lasker also rejected the Secretary's argument that on its face and as applied the severity requirement is merely a *de minimis* screening mechanism designed to improve efficiency in the adjudication of disability claims. Even assuming that

the Secretary has the authority to screen out claims involving impairments which are *de minimis*, and without consideration of vocational factors, Judge Lasker concluded that the severity regulation does not set such a standard, either as written or as applied. First, he noted that the language of the severity regulation on its face is not *de minimis*. (Pet. App. 34a-35a). Second, he considered the facts of the named plaintiffs and found that none of the named plaintiffs' impairments could be considered *de minimis*. (Pet. App. 36a-37a). Third, Judge Lasker looked to the rate at which claims were denied under the severity regulation and the Secretary's prior rules permitting denial of benefits in cases of slight impairments. Noting the dramatic increase in denials, Judge Lasker commented that "it would be absurd to assume that the change in the regulations has not played a substantial part in it." (Pet. App. 37a). Judge Lasker considered the Secretary's own public statement in 1980 that he had "expanded" the severity regulation in 1978 in order to limit the number of cases in which vocational factors would be considered. Judge Lasker found unpersuasive the Secretary's argument that this statement did not indicate an intent to limit entitlement. He wrote:

> [T]here can be no blinking the Secretary's 1980 statement that the regulation *was* intended to "limit[] the number of cases" in which vocational factors would be considered—something which, it would appear, can only be accomplished by increasing the number of cases decided on medical grounds alone.

(Pet. App. 38a).

18. Judge Lasker considered the appropriate scope of preliminary relief. Based on his finding that the Secretary was systematically denying disability benefits in violation of the Social Security Act, Judge Lasker enjoined the Secretary from relying on the policies in the severity regulation and rulings to deny benefits. (Pet. App. 54a). In addition, Judge Lasker ordered the Secretary to re-evaluate the claims of class members whose cases were pending on the date the complaint was filed, since individual

appeals would merely delay evaluation under proper standards. The Secretary did not argue for an alternative form of injunction.[2]

19. Following passage of the Disability Benefits Reform Act of 1984, Pub. L. No. 98-460, 98 Stat. 1794, *et seq.*, the Secretary moved to vacate the District Court's injunction against use of the severity regulation on the ground that Congress had expressed approval of an independent medical severity threshhold. Plaintiffs argued in their opposition papers that nothing in the Reform Act sanctioned an independent severity test and that, at most, Congress may have indicated approval of *de minimis* efficiency measures that eliminate only meritless claims. Plaintiffs presented additional evidence obtained during discovery to establish that the standard embodied in the severity regulation is not a *de minimis* one. The Secretary presented no contrary evidence. Ruling on the Secretary's motion to vacate, Judge Lasker held that nothing in the Reform Act or its legislative history sanctioned the severity test employed by the Secretary.

20. The Secretary next appealed to the United States Court of Appeals for the Second Circuit. In his brief on appeal, the Secretary drew the court's attention to Social Security Ruling (SSR) 85-28, which was issued during the pendency of the appeal. The Secretary argued that SSR 85-28 demonstrated that the severity regulation eliminated from consideration only *de minimis* impairments. The Secretary also informed the court that a prior ruling, SSR 82-55, listing impairments that would always be treated as not-severe had been "obsoleted." Plaintiffs objected that it was unclear from the face of SSR 85-28 whether it would, in fact, operate as a *de minimis* screening mechanism and that, in any event, the District Court should be given an opportunity to review the ruling to determine whether it constituted such a clear abandonment of past practices as to provide a basis for modifying the injunction. Plaintiffs also submitted evidence to the Court of Appeals indicating that the Secretary was continuing

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[2] The Secretary's proposed order only challenged certain time limits and technical procedures for administering the order, which are not at issue in this appeal.

to apply examples such as those in the "obsoleted" SSR 82-55.[3] Plaintiffs invited the Secretary to make a motion to modify the injunction to the District Court which would be in a position to review all of this evidence. The Secretary has made no such motion.

21. On March 6, 1986, the United States Court of Appeals for the Second Circuit affirmed the District Court's preliminary injunction. The panel noted that the Secretary had not challenged the District Court's factual findings, the form of the injunction or plaintiffs' demonstration of irreparable harm. The panel concluded that plaintiffs had shown a likelihood of success in showing that the severity regulation operates in a manner violative of the Social Security Act. The panel did not address the issues raised by SSR 85-28, thereby leaving the Secretary free to pursue any appropriate relief in the District Court.

REASONS WHY THE PETITION SHOULD BE DENIED

A. *Resolution of* Yuckert *in the Secretary's Favor Would Not Dispose of the Issues Presented Here.*

The Secretary's argument that the petition here should be held and disposed of in light of the Court's decision in *Yuckert* rests on the conclusory assertion that "[i]f the Court sustains the validity of the severity regulation in *Yuckert*, the preliminary injunction must be reversed." (Pet. at 12-13). This assertion is disingenuous in light of the Secretary's own statements to this Court in *Yuckert*. In response to Yuckert's argument that the absence of an adequate factual record in that case made review inappropriate, the Secretary assured the Court that "there is no need for factual development," because:

> *[t]he only issue before this Court is whether the severity regulation is invalid on its face.* That is a question of law, and as respondent concedes, "[t]he Ninth

[3] *See* Addendum to Brief for Plaintiffs-Appellees and Plaintiffs-Intervenors-Appellees, submitted to the Court of Appeals, at 109.

> Circuit's analysis is based on solely legal grounds." *If the Court sustains the regulation against respondent's facial challenge, questions regarding its application in particular factual circumstances can be resolved as they arise.*

Yuckert Reply Br. at 4 (emphases added).

The Secretary cannot have it both ways. Having sought review in *Yuckert* by claiming that the case only presented the issue of the severity regulation's facial validity, he cannot now claim that a decision in that case will dispose of fact-based challenges to his application of the severity regulation. Indeed, the Secretary expressly conceded that "questions regarding [the severity regulation's] application" fall outside the scope of his appeal in *Yuckert*. *Id.*

Resolution of the instant case turns upon just such factual questions concerning the regulation's application. To be sure, the District Court below held that plaintiffs had established a likelihood of demonstrating the facial invalidity of the severity regulation.[4] But the District Court carried its analysis further, assumed the legality of a *de minimis* severity step, and, based on the "clear evidence" before it, found that the Secretary was systematically applying the severity test as an independent barrier to eligibility, not simply as a *de minimis* screening device for weeding out meritless claims. (Pet. 36a-38a; 44a). Thus, even if the Secretary fully achieves the result he seeks in *Yuckert* - this Court's agreement that he may apply his severity regulation to "screen out" those claimants whose impairments are so minimal that they "would be found not to be disabled at subsequent steps

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[4] It should be noted here that the Secretary's sole quarrel with the Ninth Circuit's judgment in *Yuckert* is that it purportedly prohibits any threshold severity step, even a *de minimis* step. (*Yuckert* Pet. at 7-11; 19-24). Although one ground supporting the preliminary injunction here was that plaintiffs had demonstrated the likelihood that the severity regulation facially conflicts with the Social Security Act, the judgments below in no way bar the Secretary from ever instituting a truly *de minimis* medical threshold test. (*See* Pet. 12a-15a; 36a-39a; 54a).

of the sequential evaluation process in any event" (*Yuckert* Pet. at 23-24) – the preliminary injunction entered below would stand on the District Court's uncontested finding that the Secretary has in fact applied the severity step not as a *de minimis* screening mechanism, but as an independent and unauthorized eligibility restriction.

B. *Regardless of the Outcome of* Yuckert, *There is No Basis for Disturbing the Court of Appeals' Ruling Upholding the Preliminary Injunction Entered by the District Court.*

As explained above, the preliminary injunction entered by the District Court rests in part on the District Court's finding that the Secretary has applied the severity regulation as an independent eligibility restriction rather than as a *de minimis* screening device. The District Court proceeded to find that plaintiffs were likely to succeed in their challenge to the Secretary's restrictive severity practices and that plaintiffs were suffering irreparable harm from these practices. On appeal to the Second Circuit, the Secretary did not challenge the District Court's findings of fact, findings of irreparable harm or the form of the injunction.[5] Applying the appropriate standard of review, the Court of Appeals upheld the preliminary injunction as a proper exercise of judicial discretion. Inasmuch as there is no real dispute as to the legal conclusions and the factual findings that support the preliminary injunction, there is no basis for either granting plenary review or summarily vacating and remanding the injunction in light of this Court's disposition of *Yuckert*.

1. The issue whether the Social Security Act permits a severity test that is more than a *de minimis* screening device is clearly not worthy of Supreme Court review. All ten circuit courts of

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[5] In this Court, the Secretary has raised some objections to the scope of the injunction, Pet. 10-12, but does not seek review of these issues. In fact, the Secretary did not seek review of these questions in the Court of Appeals and, consequently, cannot raise these questions for the first time in this forum. *See Heckler v. Campbell*, 461 U.S. 458, 468 n. 12 (1983).

appeals that have addressed the "severity" issue have held that the Social Security Act precludes a medical threshold test that permits summary denial of claims involving more than a *de minimis* or slight impairment.[6] Although these courts differ as to whether the proper remedy is to impose a narrow construction on the severity regulation or enjoin its use in its current form altogether, all have condemned the Secretary's imposition of a substantive medical threshold that bars claims of individuals who would otherwise be adjudged disabled. Moreover, the Secretary himself no longer defends the severity regulation as an independent eligibility criterion. He now defends it solely as a *de minimis* threshold, a device designed to promote administrative efficiency without denying benefits to any person whose claim would be approved after a full vocational evaluation. *Compare Stone v. Heckler*, 752 F.2d at 1103 (in which the Secretary argued that the Act and regulations mandate a stringent medical severity threshold) and *Yuckert* Pet. 22 (in which the Secretary embraces narrow judicial construction of the severity regulation as a *de minimis* threshold test).

2. The factual question whether the Secretary has applied more than a *de minimis* threshhold is not properly subject to review because it was not challenged below. Even if the Secretary had challenged this finding, however, this issue is clearly not worthy of Supreme Court review given the preliminary stage of these proceedings and the deferential standard for reviewing factual findings by lower courts. Moreover, the Secretary himself has characterized the severity regulation as more than a *de minimis*

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[6] *McDonald v. Secretary of Health and Human Services*, 795 F.2d 1118 (1st Cir. 1986); *Wilson v. Secretary of Health and Human Services*, 796 F.2d 36 (3d Cir. 1986); *Brown v. Heckler*, 786 F.2d 1870 (10th Cir. 1986); *Hansen v. Heckler*, 783 F.2d 170 (8th Cir. 1986); *Yuckert v. Heckler*, 774 F.2d 1365 (9th Cir. 1985), *cert. granted sub nom. Bowen v. Yuckert*, No. 85-1409 (May 19, 1986); *Salmi v. Secretary of Health and Human Services*, 774 F.2d 685 (6th Cir. 1985); *Johnson v. Heckler*, 769 F.2d at 1209-13; *Evans v. Heckler*, 734 F.2d 1012 (4th Cir. 1984); *Stone v. Heckler*, 752 F.2d 1099 (5th Cir. 1985); *Brady v. Heckler*, 724 F.2d 914 (11th Cir. 1984).

threshold test in several court proceedings. *See, e.g., Stone v. Heckler*, 752 F.2d at 1103; *Salmi v. Secretary of Health and Human Services*, 774 F. 2d at 690; *Garza v. Heckler*, 771 F.2d 871 (5th Cir. 1985).

3. The District Court's ruling on the form of the injunction also was not challenged before the Court of Appeals and consequently cannot be raised here for the first time. Even if this issue had been preserved, it is clear that the District Court acted well within its authority. Judge Lasker had before him substantial uncontroverted evidence that the Secretary interpreted and applied his severity regulation as a harsh substantive standard that denied benefits to claimants who were in fact disabled. The injunction properly enjoins continued screening of disability claims based on these policies, (Pet. App. 70a), and requires readjudication of claims which were improperly rejected under the enjoined policies.[7]

4. The issuance of Social Security Rulings 85-28 and 86-8 and the "obsoletion" of Social Security Ruling 82-55 following entry of the preliminary injunction also provide no basis for disturbing the preliminary injunction. These administrative actions raise serious factual questions that are best resolved by the District Court prior to any consideration by the Court of Appeals or this

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[7] In criticizing (without seeking review of) the class certification order, the Secretary seriously mischaracterizes the decision below. Judge Lasker explicitly relied on both harm to the class and the futility of exhaustion in justifying a waiver of exhaustion requirements. (Pet. App. 29a-30a). Moreover, the issue of exhaustion in this case is similar to that in *Bowen v. City of New York*, 54 U.S.L.W. 4536 (U.S. June 2, 1986). Both cases concern a policy denying claimants their right to a full sequential evaluation pursuant to a rule initially implemented through quality assurance returns and actively hidden from public view. Finally, the Secretary erroneously suggests that the order below requires payment of benefits to persons who are not disabled. The injunction does nothing to change the standard for determining disability. It only prevents the illegal screening out of meritorious claims. The Secretary's reliance on *Heckler v. Redbud Hospital District*, 54 U.S.L.W. 3027 (U.S. July 30, 1985) is misplaced. In *Redbud*, Justice Rehnquist stayed a preliminary injunction requiring issuance of nationwide regulations. He left in place those provisions of the preliminary injunction requiring application of proper standards in determining reimbursement rates.

Court. All of these factual issues will be considered by the District Court when it rules on the merits and fashions a final injunction.

First, the policies stated in the rulings are ambiguous. In particular, the rulings do not clearly abandon the Secretary's prior practice of refusing to consider past work. Instead, they promise to consider past work only when the work was "unique." Courts disagree as to whether this language actually embraces the rule of all twelve circuits that a claimant makes out a *prima facie* case by showing an inability to return to past work. *Compare McDonald v. Secretary of Health and Human Services*, 795 F.2d at 1125, *with Hansen v. Heckler*, 783 F.2d at 175. The meaning of the Secretary's new rulings should be determined in the District Court following review of the Secretary's instructional material, quality assurance returns, and other factual matters. This inquiry is especially important since the new rulings assert that they are merely restating the policy that has always been in place. (*Yuckert* Pet. 40a).

Second, as in any case in which a court is asked to permanently enjoin practices that may have been abandoned in the course of litigation, the District Court must consider any evidence that the Secretary proffers showing that he has abandoned his illegal past practices and is unlikely to return to them following vacatur or modification of the injunction. *See City of Mesquite v. Aladdins's Castle, Inc.*, 445 U.S. 283, 289 & n.10 (1982). In this case, the District Court must consider the ease with which the Secretary may issue and formally "obsolete" Social Security Rulings and the Secretary's past pattern of stating one rule publicly while implementing another internally. The District Court would also consider the relevance of the Secretary's failure to employ formal rulemaking procedures, in light of his statutory obligation to follow rulemaking procedures on matters relating to disability. *See* 42 U.S.C. § 421(k)(2).[8] These matters may be best addressed

[8] As this Court noted in *Heckler v. Campbell*, 461 U.S. at 470, formal rulemaking provides an essential procedural safeguard when the Secretary seeks to

(Footnote Continued)

by the District Court on an appropriate motion or following a trial on the merits. Indeed, the Court of Appeals specifically noted that in fashioning final relief after trial, the District Court should consider whether there were appropriate methods for narrowing the scope of the injunction. (Pet. App. 15a). Changes in the Secretary's practices, if any, would surely be considered at that stage. At this stage in the litigation, none of these facts or legal questions have been considered below and they are therefore not properly presented for review by this Court.

C. *The Secretary Has Made No Showing That He Would Be Prejudiced By Awaiting a Final Trial on the Merits.*

Because the injunction entered below is a preliminary injunction, the Secretary remains free to present any additional facts or arguments at the final trial on the merits. In addition, the Secretary may return to the District Court to present any proposals for modification of the injunction. The Secretary has made no showing either to this or any other court, that he would be prejudiced by pursuing his claims in that forum.[9] In contrast, vacatur of the injunction would remove protections ordered by the District Court and cause harm to members of the plaintiff class.

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dispense with individualized adjudication. The Secretary has never submitted his assumptions about the availability of jobs for persons with "not severe" impairments to this process. He suggests that a non-expert can simply guess on a case-by-case basis whether an impairment would prevent anyone from engaging in substantial gainful activity, irrespective of age, education, and work experience.

[9] The Secretary presented no evidence to the District Court suggesting that he would be harmed by entry of a preliminary injunction and did not seek a stay from the injunction. Indeed, the injunction, which has been in effect for two years, does not prevent the Secretary from denying benefits to anyone who fails to meet the Act's criteria for evaluating disabilities. It only precludes use of an alleged "screening" device that the District Court found to be a harsh substantive standard causing irreparable harm to the plaintiff class.

1. The Secretary erroneously suggests that the injunctive relief to class members whose claims were previously adjudicated is not relevant to the disposition of his petition because this relief "is now being accomplished" and that, in any event, some class members may be entitled to readjudications under the Disability Benefits Reform Act of 1984. (Pet. 12 n.5). Most class members, however, do not fall within the narrow scope of the Reform Act's provisions. Moreover, the relief ordered below "is now being accomplished" only as a result of the injunction below. If the injunction were reversed, these class members would lose their rights to an immediate readjudication.[10] This result would be clearly wrong since the Secretary no longer disputes that these class members' claims were originally adjudicated improperly. Indeed, the Secretary is not even seeking review of the propriety of these persons being included in the plaintiff class.

2. The injunction below also provides class members with crucial relief from any ongoing application of an illegal severity standard. As respondents set forth above, the record thus far in this case provides overwhelming evidence that the Secretary has applied an illegal medical threshhold test. The District Court's injunction prevents hardship to class members by halting these practices and assuring that class members will not have to take each case individually to court in order to obtain proper adjudication of their claims. It does not, however, in any way alter the ultimate standards for determining disability.

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[10] Although the District Court order included time limits on readjudication, these time limits only require the Secretary to make good faith efforts to comply with the time limits. The Secretary's most recent report to plaintiffs' counsel shows that of 4150 hearings scheduled pursuant to the injunction, 516 hearings have not yet been held. Decisions have not been rendered in an additional 736 cases. Furthermore, the parties only recently entered into a consent order regarding location of class members. *Dixon v. Heckler*, No. 83-7001 (S.D.N.Y. Nov. 15, 1985) (consent order). Because of delays in negotiating the terms of this order and implementing instructions, many class members who had live claims as of the date this case was filed have not yet had a new hearing scheduled. Thus, there are even more class members who depend on continued enforcement of the preliminary injunction in order to obtain proper adjudication of their claims for benefits.

CONCLUSION

For the above stated reasons, the petition for certiorari should be denied irrespective of this Court's disposition of *Bowen v. Yuckert*, No. 85-1409.

Respectfully submitted,

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